SUPREME COURT, U.S.
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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

No. 1089

CHARLES NESBITT, OLIVER HODGE and BUCK COOK, individually, and as the Oklahoma Literature Commission, CHARLES NESBITT, as Attorney General of the State of Oklahoma, and CURTIS HARRIS, individually, and as an Officer of the State of Oklahoma, County Attorney of Oklahoma County,

Appellants,

VERSUS

ARTHUR C. HOLDING, d/b/a Grand News,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JURISDICTIONAL STATEMENT

CHARLES NESBITT
Attorney General of Oklahoma

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Assistant Attorney General

Counsel for Appellants

December 15, 1966

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-0030

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In the
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OCTOBER TERM, 1966

No. .....

CHARLES NESBITT, OLIVER HODGE and BUCK COOK, individually, and as the Oklahoma Literature Commission, CHARLES NESBITT, as Attorney General of the State of Oklahoma, and CURTIS HARRIS, individually, and as an Officer of the State of Oklahoma, County Attorney of Oklahoma County,

Appellants,

VERSUS

ARTHUR C. HOLDING, d/b/a Grand News,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Western District of Oklahoma, entered on November 4, 1966, enjoining the enforcement of a state statute as unconstitutional, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the Western District of Oklahoma is not yet reported. Copies of the opinion, findings of fact, conclusions of law and judgment are attached hereto as Appendix "A."

JURISDICTION

On April 5, 1966, plaintiff filed in the United States District Court for the Western District of Oklahoma a verified complaint, which sought the following:

(a) The convening of a three-judge court pursuant to 28 U.S.C., §§ 2281 and 2284;

(b) A declaratory judgment, pursuant to 28 U.S.C., §§ 2201 and 2202, declaring the Oklahoma Literature Commission Act to be violative of the United States Constitution.

A judgment, declaring a portion of the Oklahoma Literature Commission Act to be violative of the United States Constitution and enjoining enforcement thereof, was entered on November 4, 1966, and notice of appeal was filed in that court on November 10, 1966. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Georgia Public Service Commission*, 371 U.S. 285, 83 S.Ct. 397, 9 L.Ed.2d 317; *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73, 80 S.Ct. 568, 4 L.Ed.2d 568.

QUESTIONS PRESENTED

(1) Whether the Oklahoma Statutory Procedure for determining the obscene nature of any publication by a proceeding before the Oklahoma Literature Commission, with judicial review available under the Oklahoma Administrative Procedure Act, meets minimum standards imposed by the United States Constitution requiring a judicial determination of the question of obscenity in an adversary proceeding prior to imposition of restraints upon sale or distribution thereof.

(2) Whether the statutory procedure set forth in the Oklahoma Literature Commission Act for determining obscenity and suppression of sale and distribution of publications found to be obscene is consistent with the rights of free speech and due process guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

(3) Whether the states have any power consistent with the First and Fourteenth Amendments to provide an administrative procedure for determination of obscenity of a publication, subject to judicial review, as opposed to a purely judicial procedure.

STATUTES INVOLVED

The following portions of 21 O.S. 1961, §§ 1040.3 and 1040.6, were declared unconstitutional by the three-judge federal court:

> "Section 3. [21 O.S. 1961, § 1040.3] *Hearings—Power of Commission.* The Commission shall make its findings upon all hearings and shall have the power to make an

order prohibiting the sale or distribution of any literature it finds to be obscene by first informing the offending party or parties prior to prohibiting such distribution or recommending prosecution as hereinafter provided.

"Section 6. [21 O.S. 1961, § 1040.6] *Violations a Misdemeanor.* Any person, partnership, company, corporation, or other agency violating any order made by the Commission under the provisions of this Act shall be guilty of a misdemeanor."

Other pertinent statutes are 21 O.S. 1961, §§ 10, 1021, 1040.1, 1040.2, 1040.3, 1040.4, 1040.5, 1040.6, 1040.7, 1040.8, 1040.9, 1040.10, of the Oklahoma Literature Commission Act and 75 O.S. Supp. 1965, §§ 318, 319, 320, 321, 322, 323, of the Oklahoma Administrative Procedure Act, which are set forth in Appendix "B" hereto, and Article II, Section 19, Oklahoma Constitution, also set forth in Appendix "B."

STATEMENT OF THE CASE

Appellee, Arthur C. Holding, who will hereinafter be referred to as plaintiff, was doing business as Grand News on March 4, 1966. On that date he was mailed notice that a complaint had been filed with the Oklahoma Literature Commission, alleging that plaintiff had sold, distributed, or otherwise provided citizens of Oklahoma with fifteen specific books alleged to be obscene. The notice informed plaintiff that a hearing would be held on March 28, 1966, at which time he might appear and present evidence.

Plaintiff's counsel appeared before the Commission on March 28, 1966, and challenged the jurisdiction of the Commission and the validity of the statutes creating the Com-

mission. However, the plaintiff chose to offer no evidence and present no defense on the question of obscenity. As a result of the hearing, the Commission concluded that 14 of the 15 books in question were obscene. Written findings supporting the Commission's conclusion were rendered. Incorporated in these findings was a notice of an intended final order to be entered in ten days prohibiting the further sale of the publications found to be obscene.

On April 5, 1966, plaintiff filed in the District Court of the Western District of Oklahoma, a verified complaint seeking injunctive relief and alleging that the statutes creating the Oklahoma Literature Commission contravened the United States Constitution. This suit dealt only with the constitutionality of the administrative procedure for determining obscenity, and was not concerned with the finding of the Commission that the fourteen books were obscene.

As a result of this suit, a three-judge federal court was convened; and upon trial, the court enjoined the Commission from making orders prohibiting the sale of literature found to be obscene. The constitutional infirmity relied on by the court was that there was no judicial determination of the issue of obscenity prior to a Commission order prohibiting the sale of literature found to be obscene; and that such a finding in an administrative proceeding, even with judicial review available, was constitutionally inadequate.

At this point it would be helpful to outline the procedural steps under Oklahoma law for determining whether a challenged publication is obscene, and thereafter for

imposition of sanctions against persons dealing in pornography. The procedure below was followed by the Commission up to the point that the court intervened by injunction.

(1) Complaint is filed with the Commission that a certain named publication alleged to be obscene is being offered for sale.

(2) Notice of the complaint and the day set for hearing is given to the seller and distributor and to the complainant, inviting each to appear and give evidence.

(3) There is no order, demand or request that sale be halted or suspended pending outcome of the hearing.

(4) On the day of hearing the complainant, the seller and distributor and any other interested person is invited to present any evidence he may choose in favor of or in opposition to the publication. The issue is whether the publication is obscene.

(5) After the hearing, the Commission makes findings as to the obscene nature of each publication.

(6) Incorporated in the findings is a notice of an intended final order to be entered ten days later, prohibiting the further sale of any publication found to be obscene.

(7) The findings and notice are served upon the seller and distributor pursuant to 21 O.S. 1961, § 1040.3, requiring that the offending party be so informed prior to prohibiting distribution or recommending prosecution.

(8) At the expiration of ten days, a final order is entered prohibiting further sale and distribution of publications found obscene.

(9) Any interested person may seek judicial review of the order pursuant to the Administrative Procedure Act, 75 O.S. Supp. 1965, §§ 301, *et seq.* The order may be stayed pending final judicial determination. Judicial review would include appeal to the Supreme Court.

(10) Once the Commission's order has become final, a seller or distributor for the first time incurs risk of sanctions by action of the Commission, and then only on account of sales occurring *after* the effective date of the order by a person having notice thereof.

(11) Assuming a seller went on to make sales of a prohibited publication in defiance of the Commission's order, the Commission could proceed in one of two ways:

(a) Recommend criminal prosecution under 21 O.S. 1961, § 1040.6, for violating the order of the Commission. The act is made a misdemeanor, punishable under 21 O.S. 1961, § 10, by fine up to $500 or imprisonment in the county jail up to one year or both.

(b) Recommend criminal prosecution under 21 O.S. 1961, § 1040.8, or 21 O.S. 1961, § 1021. In prosecutions under these laws, the order of the Commission would serve to establish the scienter necessary to sustain a conviction.

(c) In either case, the defendant would be entitled to a trial by jury. Article 2, Section 19, Oklahoma Constitution. Such jury trial necessarily would include the issue of whether the publication sold was in fact obscene, if the defendant saw fit to raise it.

THE QUESTIONS ARE SUBSTANTIAL

The Supreme Court has held that the State is free to choose its own methods of protecting its people against dissemination of pornography. The Constitution requires only that there be a determination of the question of obscenity in an adversary proceeding prior to imposition of any restraint upon sale or distribution. The Oklahoma procedure fully meets this test.

The controlling case in this regard is *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469, which involved constitutionality of a New York statute providing procedure for a "Limited injunctive remedy" against sale of obscene literature. As here, the civil action was separate from conventional criminal prosecution. Complaint was filed pursuant to a statute which authorized municipal officials to bring an action for injunction against sale of publications alleged to be obscene.

The case was tried to a judge, sitting in equity, without a jury. He found the publication obscene and entered an injunction against further sale and an order for destruction of the material.

As here, defendants did not contest the finding of obscenity, limiting their appeal to the question of constitutionality of the procedure, or as the Court said "the power of New York to employ the remedial scheme of § 22-a." The identical issue is involved here as to 21 O.S. 1961, §§ 1040.1 *et seq.*

In the opinion, the Court set the standard for civil restraint upon sale of pornography as:

> "* * * the issue of obscenity must be promptly tried and adjudicated in an adversary proceeding for which adequate notice, judicial hearing, and fair determination are assured. * * *"

The Court found it settled that states can prosecute criminally for trafficking in obscene publications; but that the State is not limited to criminal prosecutions in fighting pornography, it being for the State to select what remedies it will utilize.

The Court pointed out that the threat of traditional criminal prosecution without warning would more tend to curtail sales prior to adjudication of obscenity than would an injunctive procedure.

This is exactly the case here. No order prohibiting sale and no recommendation of prosecution occurs under Oklahoma procedure until after the question of obscenity is adjudicated in an adversary proceeding before the Commission, with opportunity for judicial review. Until the conclusion of that procedure, a seller is free to sell as he sees fit, completely without fear that any such sale will result in any form of sanction imposed by the Commission.

Where New York provided for adversary *judicial* hearing, upon proper notice, prior to imposition of restraint upon sale or distribution Oklahoma provides for adversary *administrative* hearing upon proper notice, with judicial review under the Administrative Procedure Act, prior to imposition of any restraint.

The hearing is no less adversary because it is held before an administrative agency. The plaintiff seller had

notice of the proceedings, and was given full opportunity to present any pertinent evidence desired. The fact that he chose not to defend the publication does not make the hearing any less adversary.

There is no essential difference between the Oklahoma procedure and the New York method upheld by the Supreme Court. Both provide adequate safeguards against restraint upon sale of publications prior to an adversary determination of obscenity.

The court predicated their opinion, which found the Oklahoma procedure for administrative determination of obscenity unconstitutional upon the case of *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 83 S.Ct. 63, 9 L.Ed.2d 584, involving a Rhode Island law creating the "Rhode Island Commission to Encourage Morality in Youth." The Commission was directed to "educate the public" concerning pornography, and "to investigate and recommend the prosecution of all violations" of obscenity statutes. The Commission customarily proceeded in the following fashion:

> (a) The Commission reviews publications in private in some fashion not clear from the reported decision, *except there is no adversary hearing or judicial determination of obscenity at any stage.*
>
> (b) If a majority decides that the publication is "objectionable," formal notice thereof is sent to the distributor.
>
> (c) The notice asks "cooperation" of the distributor in *halting sales,* and "reminds" him of the Commission's duty to recommend prosecution of purveyors of obscenity.

(d) Normally, upon receipt of such notice, the distributor would refuse to fill pending orders, would refuse new orders, and would pick up and return to the publisher all unsold copies.

(e) Usually a police officer called shortly after service of the notice to determine what action had been taken.

(f) Admittedly, the response of the distributor was involuntary, and intended to avoid "becoming involved in a court proceeding with a governmental agency."

The Court held the Rhode Island law unconstitutional. As here, the question was whether the procedure adopted by Rhode Island for regulation of obscenity afforded adequate safeguards against suppression of constitutionally protected publications.

In passing on this question the Court observed that:

"* * * *There is no provision whatever for judicial superintendence before notices issue or even for judicial review of the Commission's determinations of objectionableness. The publisher or distributor is not even entitled to notice and hearing before his publications are listed by the Commission as objectionable.* * * *" (Emphasis supplied.)

The features the Court found objectionable in the Rhode Island procedure are not present in the Oklahoma procedure. The seller is entitled to notice and hearing before sale of challenged publications is prohibited. Judicial review of the Commission's determination in an adversary proceeding is available, and the Commission's order may be stayed pending final judicial determination.

The very objections of the Court to the Rhode Island method serve to illustrate that the Oklahoma procedure does furnish the adequate safeguards that the Supreme Court demands.

Since Oklahoma's procedure for determining obscenity in an adversary administrative proceeding is surrounded by all the procedural safeguards envisaged in *Kingsley Books, Inc.* v. *Brown, supra,* and is not subject to the infirmities, which compelled the Court to find the Rhode Island administrative procedure for determining obscenity constitutionally defective in *Bantam Books, Inc.* v. *Sullivan, supra,* the Court is urged to take jurisdiction of this appeal and pass on the propriety of an administrative determination of the question of obscenity in an adversary proceeding where the issue of obscenity is promptly tried in an adversary proceeding for which adequate notice, judicial hearing, and fair determination are assured. The Court has never had this question before it, and if it is possible to determine the issue of obscenity in an adversary administrative proceeding, we urge the Court to delineate the procedure to be followed by such a tribunal.

No attempt was made by Judg Eubanks to set forth standards consistent with due process for determining obscenity in an administrative proceeding. Rather, he concluded that there can be no determination of the issue of obscenity by administrative proceeding, notwithstanding such proceeding is surrounded by all procedural safeguards common to a trial in any court. Notice, hearing, standards found to be adequate for determining obscenity, right to have Commission's order stayed pending appeal, and right

to appeal Commission's order to the Courts of the State prior to imposition to restraints upon sale or distribution of publications found to be obscene are all assured to a party accused of selling obscene literature before the Oklahoma Literature Commission.

Never has the United States Supreme Court concluded that due process limits a state to determining the issue of obscenity in either a criminal action or a judicial proceeding seeking injunctive relief. However, that result was reached in this case.

For the above stated reasons, we urge that the questions presented herein are substantial.

Respectfully submitted,

CHARLES NESBITT
Attorney General of Oklahoma

JEFF HARTMANN
Assistant Attorney General

Counsel for Appellants

December 15, 1966

"APPENDIX A"

FILED
SEP 26 1966
Vera L. Howard
CLERK, U. S. DISTRICT COURT
By Alice Faye Johnson
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ARTHUR C. HOLDING, d/b/a GRAND NEWS	)	
Plaintiff	)	
-vs-	)	Civil No.
CHARLES NESBITT, OLIVER HODGE and BUCK COOK, individually and as the Oklahoma Literature Commission, CHARLES NESBITT, as Attorney General of the State of Oklahoma and CURTIS HARRIS, individually, and as an officer of the State of Oklahoma, County Attorney of Oklahoma County	)	66-144
Defendants	)	

Pierce, Mock, Duncan, Counch & Hendrickson; Samuel W. Block and Thomas P. Sullivan, Attorneys for Plaintiff.

Charles Nesbitt, Attorney General of Oklahoma, and James R. Fuson, Assistant Attorney General, Attorneys for Defendants.

D. Luster Cook, Assistant Attorney General and Robert N. Naifeh, Attorneys for Defendant, Charles Nesbitt.

[APPENDIX]

Granville Scanland and Curtis Harris, Attorneys for Curtis Harris.

Before PICKETT, Senior Circuit Judge, DAUGHERTY and EUBANKS, District Judges.

EUBANKS, District Judge.

MEMORANDUM OPINION

Plaintiff, a resident and citizen of Oklahoma City and operator of a news stand therein, brought this action for a judgment declaring the Oklahoma Statutes creating the Oklahoma Literature Commission (21 O.S. 1040.1 to 1040.7) to be violative of the Constitution of the United States and for an injunction prohibiting defendants from acting under or enforcing those statutes. Principal defendants are Charles Nesbitt, Attorney General of the State of Oklahoma, Dr. Oliver Hodge, State Superintendent of Public Instruction, and Buck Cook, Commissioner of Charities and Corrections, who are ex officio members of the Oklahoma Literature Commission under the terms of the Act. The remaining defendant, Curtis Harris, is the County Attorney of Oklahoma County, Oklahoma.

A Three Judge Court was convened to hear said case pursuant to the provisions of Sections 2281 and 2284, Title 28, U.S.C.

It is alleged in the complaint and established by stipulations and documentary evidence that earlier this year commissioner defendants sent plaintiff a notice telling him that a hearing of the Oklahoma Literature Commission was to be held at the State Capitol Building, Oklahoma City, Oklahoma, on March 28, 1966, for the purpose of deter-

mining whether or not fifteen named books are deemed by the Commission to be obscene literature. Plaintiff had been selling or had sold fourteen of the fifteen books named in the notice. On the appointed date plaintiff appeared with counsel before the Commission and challenged the validity of the aforesaid statutes creating the Commission, but the Commission proceeded with its hearing and announced that fourteen of the fifteen books had been found to be obscene literature by the Commission and announced that it would issue an order prohibiting the sale or distribution of said fourteen books and that the Commission would recommend to Curtis Harris, County Attorney of Oklahoma County, that plaintiff and others be prosecuted for distribution and sale of obscene literature. Plaintiff also alleges that he is threatened with prosecution for a violation of the Commission's proposed order prohibiting the sale of the aforementioned books. Plaintiff further alleged, and defendants concede that it was contemplated that the formal order of the Commission banning the sale of the fourteen books would be entered on the seventh day of April, 1966, however, this Court entered its temporary restraining order on the sixth day of April, 1966, enjoining the Commission from entering such order. After the temporary restraining order was issued the County Attorney, Curtis Harris, instituted fourteen separate criminal prosecutions against the plaintiff herein wherein it is alleged that Arthur C. Holding did wrongfully and knowingly commit the crime of selling, offering for sale, and exhibiting an obscene book, and each separate information mentions one of the fourteen books found to be obscene by the Commission. When these fourteen criminal prosecutions were instituted the plaintiff herein requested of this Court that the temporary restraining order be enlarged to enjoin the defendant, Curtis Harris, from continuing the prosecution in those cases. In said application for an order enlarging the temporary restraining order the plaintiff contended that we have here

what is analogous to "The Fruit of the Poisoned Tree" situation where the very same books found to be offensive by the Commission are made the basis of the criminal charges and that it is circumstantially obvious that the filing of same was directly connected with the illegal Commission action, but the defendant, Curtis Harris, and other defendants herein allege that the fourteen criminal prosecutions were instituted by the County Attorney on his own initiative and that he acted independently of and in the absence of any recommendations made to him by the Oklahoma Literature Commission, and further, that the fourteen criminal cases were instituted under Sections 1040.8, 1040.9, and 1040.10, Title 21 of the Oklahoma Statutes and not under the Literature Commission procedures. In this connection it should be mentioned that the last three mentioned sections of the Oklahoma Statutes were enacted in 1961 whereas Sections 1040.1 through 1040.7 were enacted in 1957. This Court, after having thoroughly examined the pleadings and briefs of all parties bearing on the question, entered its order on August 2, 1966, denying plaintiff's application for enlargement of said order for the reasons stated therein and for additional reasons as will be shown herein.

For a full understanding of the issues in this case the 1957 Act of the Oklahoma Legislature creating the Oklahoma Literature Commission is set forth in full, to-wit:

§ 1040.1 DEFINITIONS

For the purposes of this Act:

(a) "Literature" shall mean any book, pamphlet, paper, drawing, lithograph, engraving, photograph, or picture.

(b) "Obscene literature" shall mean any literature offensive to the chastity or modesty, expressing or presenting to the mind or view something that purity and decency forbids to be exposed, or so-called comic books

which, in the opinion of the Commission, are not uplifting and beneficial to the education, welfare, and character building of the children of Oklahoma.

§ 1040.2 OKLAHOMA LITERATURE COMMISSION—MEMBERSHIP—INVESTIGATIONS—REPORTS

There is hereby created the Oklahoma Literature Commission, which shall consist of the Commissioner of Charities and Corrections, the Attorney General or a Member of his staff designated by the Attorney General, and the State Superintendent of Public Instruction or a member of the State Department of Education designated by the State Superintendent of Public Instruction. The Commissioner of Charities and Corrections shall serve as Secretary of the Commission and shall keep all of the records and files thereof. The Commission shall make such investigations as may be necessary into sales of literature which it has reason to suspect is detrimental to the morals of the citizens of this State. The Commission shall submit an annual report of its activities to the Governor and to the State Legislative Council.

§ 1040.3 HEARINGS AND FINDINGS—ORDERS

The Commission shall hold hearings and make findings on literature it finds to be obscene through its investigations or from evidence furnished to it by any citizen of the State. The person, partnership, company, corporation, or other agency selling, distributing, or otherwise providing the citizens of this State with the alleged obscene literature may appear and give evidence at such hearing. The Commission shall make its findings upon all hearings and shall have the power to make an order prohibiting the sale or distribution of any literature it finds to be obscene by first inform-

ing the offending party or parties prior to prohibiting such distribution or recommending prosecution as hereinafter provided.

§ 1040.4 PROSECUTIONS

The Commission shall recommend prosecution under the criminal laws of the State of any person, partnership, company, corporation, or other agency that it finds to be selling or otherwise distributing obscene literature. The Commission shall notify the County Attorney of the county in which such liaterature has been sold, or otherwise distributed, of its findings and recommendations, and shall provide the County Attorney with any evidence it might have obtained during its hearings and the proceedings in relation thereto. The County Attorney shall have the primary responsibility, and the Attorney General shall have the ultimate responsibility, for such prosecutions.

§ 1040.5 LITERATURE EXEMPT

The provisions of this Act shall not apply to, and there is hereby exempted therefrom, all weekly and daily newspapers, all Federal and State matters, and all reading matter used in recognized religious, scientific, or educational institutions.

§ 1040.6 PENALTY

Any person, partnership, company, corporation, or other agency violating any order made by the Commission under the provisions of this Act shall be guilty of a misdemeanor.

§ 1040.7 PAYMENT OF EXPENSES

All expenses necessary to be incurred by the Commission in carrying out the provisions of this Act shall

be paid from appropriations made for the operation of the office of the Commissioner of Charities and Corrections.

The 1961 Act of the Oklahoma Legislature provides as follows:

§ 1040.8 Publication, Distribution or Participation in Preparation of Any Obscene Material or Presentation—Penalty

It shall be unlawful for any person to knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, publish, offer to publish, or otherwise distribute, make display, or exhibit, any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, picture, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, presentation, or other article which is obscene, and any person who shall violate any provision of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a period of not more than one (1) year or by a fine of not more than One Thousand Dollars ($1,000.00) or by both such fine and imprisonment.

§ 1040.9 Obscene Literature Defined

"Obscene literature" shall mean any literature which, considered as a whole in the light of contemporary community standards, has as its predominant theme an appeal to prurient interest.

§ 1040.10 Provisions Cumulative

The provisions of this act shall be cumulative to existing laws.

Addressing ourselves further to the proposition advanced and urged by plaintiff that the fourteen criminal prosecutions pending in the Common Pleas Court of Oklahoma County should be stopped, and partially reiterating our earlier order, we are of the opinion that the 1957 legislation and the 1961 legislation detailed above allow two separate and independent proceedings with only one involving the Oklahoma Literature Commission. The United States Courts are most reluctant to enjoin the enforcement of the criminal laws of the state. See *Douglas* v. *Jeanette*, 319 U. S. 157. The only case called to our attention wherein the United States Courts have restrained pending or threatened state court criminal prosecution is *Dombrowski* v. *Pfister*, 380 U. S. 479, but the facts in the Dombrowski case are in no way analogous to those presented in this proceeding and we have concluded that it is not precedent for enjoining the fourteen criminal prosecutions. However, we do wish to quote from the Dombrowski case some general principles which we think to be applicable to the elected officials in the State of Oklahoma and specifically those defendants herein to-wit:

> "It is generally to be assumed that the state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

> "And in a variety of other contexts the Court has found no special circumstances to warrant cutting short the normal adjudication of constitutional defenses in the course of a criminal prosecution. In such cases it does not appear that the plaintiffs have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing

the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued in this Court.' "

Further in connection with this matter, we have not seen the fourteen books involved in this case and are not called upon to determine the question of whether or not they are obscene. We find from the pleadings and admissions and stipulations that the defendant, Curtis Harris, instituted said fourteen criminal prosecutions independent of and in absence of any recommendation made to him by the Oklahoma Literature Commission but even if the Commission had recommended prosecutions in said cases the "Fruit of the Poisoned Tree" doctrine enunciated in *Nardone* v. *U. S.*, 308 U.S. 338, would not justify or allow us to enjoin said prosecutions. Here we have no indication that the books in question were obtained from plaintiff by the Commission through other than legal means. Plaintiff simply contends that Commission procedures are lacking in due process and contravene the First and Fourteenth Amendments. Since the findings of the Commission would not be binding upon the court or jury trying the fourteen criminal cases nor even admissible in evidence and since the criminal trials will be conducted with due regard to all of plaintiff's constitutional rights with the burden upon the State to prove beyond a reasonable doubt all essential allegations, including, among others, scienter and that the book(s) are indeed obscene, *we again decline to halt the orderly determination of those charges.* We believe and hold that any citizen of the United States may freely recommend to the proper official a prosecution of what the citizen believes to be an unlawful act. It then rests with the prosecution to determine if charges should be filed. *We believe and further hold that the Oklahoma Literature Commission would be well within its right to recommend a prosecution to the proper county attorney of offenders of*

the obscenity laws of the State of Oklahoma even if they obtain their evidence at hearings prescribed by Section 1040.3 of the act. We go further and say that in our opinion the Commission would be *derelict in its duty if it failed to report a violation of the obscenity statutes if it has knowledge of such violation.* Any private citizen has the right to report the violation of the criminal laws to the appropriate prosecuting authority and may be morally obligated to do so although there is no legal requirement that such be done (*Wilson* v. *State*, 306 P.2d 717). *Certainly then plaintiff has no legal standing to denounce the Commission for "turning him in" if in fact the Commission had done so.* And when the duly authorized prosecuting attorney files a criminal charge whether his attention is directed thereto by a board, commission, or private citizen, no court, State or Federal, should place any impediment in the path of orderly determination of the charge except for extenuating and compelling reasons as in Dombrowski. If plaintiff is not selling or has not sold obscene books, he has nothing to fear from the pending prosecutions. *If he has violated the criminal laws of the Sovereign State of Oklahoma in that regard, he ought to be punished therefor.*

The plaintiff herein has requested that we declare the Oklahoma Literature Act invalid in toto which we decline to do. However, we find no difficulty in declaring invalid the last sentence of Section 1040.3 which provides:

> The Commission shall make its findings upon all hearings and *shall have the power to make an order prohibiting the sale or distribution of any literature it finds to be obscene by first informing the offending party or parties prior to prohibiting such distribution or recommending prosecution as hereinafter provided.*

And we further have no doubt whatever that Section 1040.6 is altogether invalid.

Accordingly, the defendants herein and those acting by, through, or under them are hereby restrained and enjoined from *making any order prohibiting the sale or distribution of any literature and from instituting any criminal proceedings under Section 1040.6 for violation of any Commission orders.* This ruling is no reflection on the integrity, good faith, or judgment of the individual commissioners, but is based squarely upon decisions of the United States Supreme Court in *Bantam Books* v. *Sullivan,* 372 U.S. 58, *Freedman* v. *Maryland,* 380 U.S. 51, *Marcus* v. *Search Warrant,* 367 U.S. 717, and *Reed Enterprises* v. *Corcoran,* 354 F.2d 519. In the Bantam Books case cited above it was shown that the Rhode Island Legislature had created the Rhode Island Commission to encourage morality in youth whose duty it was to educate the public concerning obscene literature and to investigate and recommend the prosecution of all violations of the Rhode Island Obscenity Statutes. The Commission's practice was to notify distributors that certain named books and magazines had been declared objectionable by the Commission. No criminal prosecution was expressly threatened, but the Commission's notices stated that copies of the list of objectionable publications had been distributed to local police. The distributors usually removed the named books from circulation on receipt of the Commission's notice. Four publishers of paperback books filed suit for a judgment that the Commission's practices contravened the federal constitution. In the United States Supreme Court the Commission argued that it simply exhorts booksellers and advises them of their legal rights. In answer to this proposition the Court said:

> "'. . . This contention, premised on the Commission's want of power to apply formal legal sanctions, is untenable. It is true that appellants' books have not been seized or banned by the State, and that no one has been prosecuted for their possession or sale. But

though the Commission is limited to informal sanctions—the threat of invoking legal sanctions and *other means of coercion, persuasion, and intimidation—the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim.* We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibt the circulation of publications to warrant injunctive relief.

* * * * * * *

"... People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around, and Silverstein's [a distributor] reaction, according to uncontroverted testimony, was no exception to this general rule. The Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributors, invariably followed up by police visitations, in fact stopped the circulation of the listed publications ex proporio vigore. It would be naive to credit the State's assertion that these blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation independent of the laws against obscenity. . . ."

The Supreme Court held that the Rhode Island Commission's practices were unconstitutional and in doing so further said:

"Herein lies the vice of the system. The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary. *In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated*

the safeguards of the criminal process. Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process. The Commission's partcice is in striking contrast, *in that it provides no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter.* It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."

Therein, and quoting from *Marcus* v. *Search Warrant,* 367 U.S. 717, the Court further said:

> "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity without regard to the possible consequences for constitutionally protected speech."

And in "Bantam Books" the Court said further:

> "What Rhode Island has done, in fact, has been to subject the distribution of publications to a *system of prior administrative restraints,* since the Commission is not a judicial body and its decisions to list particular publications as objectionable do not follow judicial determinations that such publications may lawfully be banned. *Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."*

It will be readily seen that the Oklahoma Literature Commission Act is even more objectionable than the act of the Rhode Island Legislature, especially in that the Oklahoma act authorizes the Commission to *enter an order banning the sale of literarure it finds to be objectionable and further permits the prosecution of one who violates the*

administrative ban all of which may occur before there is any judicial determination of obscenity. The defendants herein urge that the Administrative Procedures Act, 75 O.S. § 301-325 affords a judicial review of any order made by the Oklahoma Literature Commission. *With this we can agree, but we cannot concede that same will suffice to cure the constitutional infirmities in the Oklahoma Literature Commission Act for at least three reasons.* First, there is no provision for judicial superintendence before orders are made and no requirement that the Commission seek a judicial review of its determinations of obscenity as required by "Bantam Books," "Freedman," and *Kingsley Books* v. *Brown,* 354 U.S. 436. Secondly, we hold that the Administrative Procedures Act is inadequate to obviate the constitutional defects in the Literature Commission Act because same provides *no limitation on the time within which a decision must be made by the reviewing judge on matters submitted to him as is required by Marcus* v. *Search Warrant, supra, and Kingsley Books, supra.* Thirdly, there would be no jury trial on the issue of obscenity *in cases prosecuted under § 1040.6 as is required by the Oklahoma Constitution.* We wholeheartedly agree with the defendants herein that the Oklahoma Literature Commission Act was passed for salutary purposes. However, we cannot under established law permit Sections 1040.1(b), 1040.6 and the last sentence in Section 1040.3 to stand. And in leaving in force those portions of the Oklahoma Literature Commission Act which are not herein declared unconstitutional, we must issue a *word of warning.* "Bantam Books" clearly condemns notices or orders issued to claimed offenders by a state agency such as the Oklahoma Literature Commission, and also condemns censorship effectuated by extra legal sanctions. The Commission is free to investigate and recommend prosecution to the appropriate law enforcement agency, but it may not in its activities indulge in threats of prosecution against claimed offenders or employ other

means of coercion, persuasion and intimidateion. Their activities cannot, in effect, be a substitution for the State's criminal regulation of obscenity. This is the office and responsibility of the prosecutors.

Plaintiff complains of the vague and indefinite definition of "obscene literature" contained in Section 1040.1(b) of the Act. *We agree that same is unconstitutional for lack of preciseness.* (See *Butler* v. *Michigan*, 352 U.S. 380). However, we further hold that the *definition in Section 1040.9, under which the fourteen cases were filed, substantially conforms with the standard of constitutionally unprotected material as set forth in Roth* v. *U. S., 354 U.S. 476, Ginsberg* v. *U. S., 383 U.S. 463, and Fanny Hill* v. *Attorney General, 383 U.S. 413.*

Defendants have urged us to abstain from determination of constitutional questions herein. This matter was disposed of in our written order of June 9th overruling motions to dismiss. We neither add to nor substract from that ruling here.

Counsel for the plaintiff will prepare a Judgment in conformity with the foregoing. Rule 58 F.R.C.P

Dated this 26th day of September, 1966.

/s/ JOHN C. PICKETT
United States Senior Circuit Judge

/s/ FRED DAUGHERTY
United States District Judge

/s/ LUTHER B. EUBANKS
United States District Judge

"APPENDIX B"

TEXT OF STATUTES INVOLVED:

21 O.S. 1961, §§ 10, 1021, 1040.1, 1040.2, 1040.3, 1040.4, 1040.5, 1040.6, 1040.7, 1040.8, 1040.9, 1040.10,—and—75 O.S. Supp. 1965, §§ 318, 319, 320, 321, 322, 323. Article II, Section 19, of the Oklahoma Constitution.

21 O.S. 1961, § 10:

"Except in cases where a different punishment is prescribed by this chapter or by some existing provisions of law, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding one year or by a fine not exceeding five hundred dollars, or both such fine and imprisonment."

21 O.S. 1961, § 1021:

"Every person who wilfully and lewdly either:

"(1) exposes his person, or private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or

"(2) procures, counsels, or assists any person to expose himself, or to take any part in any model artist exhibition, or to make any other exhibition of himself to public view, or to the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts; or

(3) writes, composes, sterotypes, prints, photographs, designs, copies, draws, engraves, paints, molds, cuts, or otherwise prepares, publishes, sells, distributes,

keeps for sale, or exhibits any obscene or indecent writing, paper, book, picture, photograph, figure or form of any description; or

"(4) makes, prepares, cuts, sells, gives, loans, distributes, or keeps for sale, or exhibits any disc record, metal, plastic or wax, wire or tape recording, or any other kind of sound recording of any obscene or indecent language, poetry, songs, or speaks any words by means of a telephone to any female person which would be offensive to decency or is calculated to excite to vicious or lewd thoughts or acts, or any other communicable words, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts, is guilty of a felony and upon conviction therefor shall be punished by the imposition of a fine not less than Ten Dollars ($10.00) nor more than One Thousand Dollars ($1,000.00) or by imprisonment for not less than thirty (30) days nor more than ten (10) years, or by both such fine and imprisonment."

21 O.S. 1961, § 1040.1:

"For the purposes of this Act:

"(a) 'Literature' shall mean any book, pamphlet, paper, drawing, lithograph, engraving, photograph, or picture.

"(b) 'Obscene literature' shall mean any literature offensive to the chastity or modesty, expressing or presenting to the mind or view something that purity and decency forbids to be exposed, or so-called comic books which, in the opinion of the Commission, are not uplifting and beneficial to the education, welfare, and character building of the children of Oklahoma."

[APPENDIX].

21 O.S. 1961, § 1040.2:

"There is hereby created the Oklahoma Literature Commission, which shall consist of the Commissioner of Charities and Corrections, the Attorney General or a member of his staff designated by the Attorney General, and the State Superintendent of Public Instruction or a member of the State Department of Education designated by the State Superintendent of Public Instruction. The Commissioner of Charities and Corrections shall serve as Secretary of the Commission and shall keep all of the records and file thereof. The Commission shall make such investigations as may be necessary into sales of literature which it has reason to suspect is detrimental to the morals of the citizens of this State. The Commission shall submit an annual report of its activities to the Governor and to the State Legislative Council."

21 O.S. 1961, § 1040.3:

"The Commission shall hold hearings and make findings on literature it finds to be obscene through its investigation or from evidence furnished to it by any citizen of the State. The person, partnership, company, corporation, or other agency selling, distributing, or otherwise providing the citizens of this State with the alleged obscene literature may appear and give evidence at such hearing. The Commission shall make its findings upon all hearings and shall have the power to make an order prohibiting the sale or distribution of any literature it finds to be obscene by first informing the offending party or parties prior to prohibiting such distribution or recommending prosecution as hereinafter provided."

21 O.S. 1961, § 1040.4:

"The Commission shall recommend prosecution under the criminal laws of the State of any person, partnership, company, corporation, or other agency that it finds to be selling or otherwise distributing obscene literature. The Commission shall notify the County Attorney of the county in which such literature has been sold, or otherwise distributed, of its findings and recommendations, and shall provide the County Attorney with any evidence it might have obtained during its hearings and the proceedings in relation thereto. The County Attorney shall have the primary responsibility, and the Attorney General shall have the ultimate responsibility, for such prosecutions."

21 O.S. 1961, § 1040.5:

"The provisions of this Act shall not apply to and there is hereby exempted therefrom, all weekly and daily newspapers, all Federal and State matters, and all reading matter used in recognized religious, scientific, or educational institutions."

21 O.S. 1961, § 1040.6:

"Any person, partnership, company, corporation, or other agency violating any order made by the Commission under the provisions of this Act shall be guilty of a misdemeanor."

21 O.S. 1961, § 1040.7:

"All expenses necessary to be incurred by the Commission in carrying out the provisions of this Act shall be paid from appropriations made for the operation of the office of the Commission of Charities and Corrections."

21 O.S. 1961, § 1040.8:

"It shall be unlawful for any person to knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, publish, offer to publish, or otherwise distribute, make display, or exhibit any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, picture, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, presentation, or other article which is obscene, and any person who shall violate any provision of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a period of not more than one (1) year or by a fine of not more than One Thousands Dollars ($1,000.00) or by both such fine and imprisonment."

21 O.S. 1961, § 1040.9:

"'Obscene literature' shall mean any literature which, considered as a whole in the light of contemporary community standards, has as its predominant themes an appeal to prurient interests."

21 O.S. 1961, § 1040.10:

"The provisions of this act shall be cumulative to existing laws."

75 O.S. Supp. 1965, § 318:

"(1) Any person or party aggrieved or adversely affected by a final order in an individual proceeding, whether such order is affirmative or negative in form, is entitled to certain, speedy, adequate and complete judicial review thereof under this Act, but nothing in this Section shall prevent resort to other means of review, redress, relief or trial de novo, available be-

cause of constitutional provisions. Neither a motion for new trial nor an application for rehearing shall be prerequisite to secure judicial review.

"(2) The judicial review prescribed by this Section, as to orders rendered in individual proceedings by agencies whose orders are made subject to review, under constitutional or statutory provisions, by appellate proceedings in the Supreme Court of Oklahoma, shall be afforded by such proceedings taken in accordance with the procedure and under the conditions otherwise provided by law, but subject to the applicable provisions of Sections 19, 20, 21, 22, 23 and 24 of this Act, and the rules of the Supreme Court. In all other instances, proceedings for review shall be instituted by filing a petition, in the district or superior court of the county in which the agency or institution is located in which the property interest affected is situated or in the district court of the county in which the agency or institution is located within thirty (30) days after the appellant is notified of the order as provided in Section 12 hereof. Copies of the petition shall be served upon the agency and all other parties of record, and proof of such service shall be filed in the court within ten (10) days after the filing of the petition. The court, in its discretion, may permit other interested persons to intervene."

75 O. S. Supp. 1965, §319:

"(1) The filing of a proceeding for review shall not stay enforcement of the agency decision; but the agency may do so, or the reviewing court may order a stay upon such terms as it deems proper, and shall do so whenever required by subsection (2) of this Section.

"(2) In every proceeding in any court for the review of an order of an agency, upon the filing of an

application, supported by verified statements of material fact establishing that the enforcement of the order pending final decision would result in present, continuous and irreparable impairment of the constitutional rights of the applicant, a stay of the enforcement of such order and of the accrual of penalties thereunder shall be entered upon the condition that:

"(a) injury to adverse parties or to the public, as the case may be, can be obviated through the furnishing of security adequate to compensate for any loss which may be suffered as a result of the stay in the event the order is affirmed in whole or in part;

"(b) a supersedeas bond, in the amount and with sureties prescribed and approved by the reviewing court, in its sound judicial discretion, as adequate to meet requirement (a), be filed with such court. If an application for supersedeas hereunder, accompanied by a proposal for a supersedeas bond, is not acted upon by the court within forty-five (45) days from the filing thereof, the order appealed from thereupon shall be automatically superseded and stayed, during the pendency of the appeal, upon the filing of the bond proposed in the application, provided, however, that the court thereafter may reasonably modify the terms of the supersedeas as to amount and surety whereupon the appellant shall comply with such modification in order to maintain the supersedeas in effect."

75 O.S. Supp. 1965, § 320:

"Within thirty (30) days after service of the petition for review or equivalent process upon it, or within such further time as the reviewing court, upon application for good cause shown, may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the pro-

ceeding under review; but, by stipulation of all parties to the review proceeding the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs resulting therefrom. The court may require or permit subsequent corrections or additions to the record when deemed desirable."

75 O.S. Supp. 1965, § 321:

"The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs."

75 O.S. Supp. 1965, § 322:

"(1) In any proceeding for the review of an agency order, the Supreme Court or the District or Superior Court, as the case may be, in the exercise of proper judicial discretion or authority, may set aside or modify the order, or reverse it and remand it to the agency for further proceedings, if it determines that the substantial rights of the appellant or petitioner for review have been prejudiced because the agency findings, inferences, conclusions or decisions, are:

"(a) in violation of constitutional provisions; or

"(b) in excess of the statutory authority or jurisdiction of the agency; or

"(c) made upon unlawful procedure; or

"(d) affected by other error of law; or

"(e) clearly erroneous in view of the reliable, material, probative and substantial competent evidence,

as defined in Section 10 of this Act, including matters properly noticed by the agency upon examination and consideration of the entire record as submitted; but without otherwise substituting its judgment as to the weight of the evidence for that of the agency on question of fact; or

"(f) arbitrary or capricious; or

"(g) because findings of fact, upon issues essential to the decision were not made although requested.

"(2) The reviewing court, also in the exercise of proper judicial discretion or authority, may remand the case to the agency for the taking and consideration of further evidence, if it is deemed essentual to a proper disposition of the issue.

"(3) The reviewing court shall affirm the order and decision of the agency, if it is found to be valid and the proceedings are free from prejudicial error to the appellant."

75 O.S. Supp. 1965, § 323:

"An aggrieved party, or the agency, without any motion for a new trial, may secure a review of any final judgment of a district or superior court under this Act by appeal to the Supreme Court. Such appeal shall be taken in the manner and time provided by law for appeal to the Supreme Court from the district court in civil actions. An agency taking an appeal shall not be required to give bond."

Article II, Section 19, Oklahoma Constitution:

"The right of trial by jury shall be and remain inviolate, and a jury for the trial of civil and criminal cases in courts of record, other than county courts, shall consist of twelve (12) persons; but in county

courts and courts not of record, a jury shall consist of six (6) persons. This Section shall not be so construed as to prevent limitations being fixed by law upon the right of appeal from judgments of courts not of record in civil cases concerning causes of action involving less than Twenty Dollars ($20.00). In civil cases, and in criminal cases less than felonies, three-fourths (3/4) of the whole number of jurors concurring shall have power to render a verdict. In all other cases the entire number of jurors must concur to render a verdict. In case a verdict is rendered by less than the whole number of jurors, the verdicts shall be in writing and signed by each juror concurring therein. As amended State Question No. 354, Referendum Petition No. 101. Adopted primary election July 1, 1952."